BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995) **(FCC Triennial Review Nine-Month Phase)**

ADMINISTRATIVE LAW JUDGE'S RULING DENYING MOTION

Introduction

This ruling denies, without prejudice, the motion filed on June 8, 2004, by the Competitive Carrier Coalition and the California Association of Competitive Telecommunications Companies (CalTel). Denial of the motion in no way prejudges the substantive merits of parties' arguments concerning the manner in which contract terms must be continued or may be amended. As explained below, disputes concerning the process for implementing contract amendments in response to change-of-law provisions should be addressed on a case-by-case basis based on the applicable governing contract language in each interconnection agreement (ICA). Parties thus retain the right to file for appropriate dispute resolution in accordance with the terms of the applicable ICA and governing state and federal law to the extent that they believe that contract amendments are being unilaterally implemented for a particular ICA in an unlawful manner.

Background

Movants bring their motion in response to concerns regarding the effects of the D.C. Circuit's decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), and the resulting consequences for the continuation of existing interconnection agreements with SBC California and Verizon California, Inc. *USTA II*, which vacates various provisions of the Federal Communications Commission's (FCC) Triennial Review Order (TRO) became effective on June 16, 2004. Movants claim that SBC and Verizon have refused to confirm that they will not alter or discontinue their provision of high capacity loops, transport and switching as a result of *USTA II* becoming effective. Movants argue that although SBC has asserted in other jurisdictions that it will adhere to existing agreements, there is no agreement among parties as to what "adherence" means. Movants thus seek an order affirming that SBC and Verizon shall remain obligated to provide unbundled loops, transport, and switching network elements on existing rates and terms unless and until amendments to their currently effective interconnection contracts are approved by this Commission pursuant to Section 252. Replies in support of the motion were filed by AT&T, MCI, Sprint, PacWest Telecomm, and the Pure UNE-P Coalition. Replies in opposition to the motion were filed by SBC California (SBC) and Verizon California, Inc. (Verizon).

Responses in Opposition to the Motion

SBC and Verizon filed responses in opposition to the motion. SBC denies that it will take unilateral action in disregard of its existing, effective interconnection agreements. SBC asserts that it will continue to adhere to its existing, effective interconnection agreements, including applicable change of law provisions.

SBC further argues that the Motion requests unlawful relief namely, an order requiring SBC to continue providing specific network elements *indefinitely* in the wake of the issuance of the *USTA II* mandate, regardless of what SBC's interconnection agreements provide. SBC explains that its obligations to continue to provision network elements in the wake of a change of law are governed in the first instance by the language in its various interconnection agreements. SBC cites a Ninth Circuit holding that this Commission may not generically assert that interconnection agreements include any particular obligations, irrespective of the specific language included in them.[1] Specifically, in *Pac-West Telecomm, supra,* the Ninth Circuit reviewed this Commission's "generic" orders, applicable to all interconnection agreements, that purported to require the payment of reciprocal compensation for Internet-bound traffic. The court held that these "generic" orders, promulgated "without reference" to the specific terms contained in any particular interconnection agreements, were contrary to the text and structure of the 1996 Act. (*See* 325 F.3d at 1128-29.)

SBC reviews various actions it has taken to provide assurance that it will continue to meet its contractual obligations. SBC calls attention to its open letter sent to FCC Chairman Michael Powell stating that it "will continue providing to our wholesale customers the mass-market UNE-P, loops and high-capacity transport between SBC offices and will not unilaterally increase the applicable state-approved prices for these facilities at least through the end of this year."[2]

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[1] *See Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003).

[2] *See* Letter from SBC Chairman and CEO Edward C. Whitacre to FCC Chairman Michael K. Powell (June 9, 2004) (Attachment C to SBC's Reply to Motion).

SBC reiterated this commitment to rate stability in an accessible letter issued June 10, 2004.[3] SBC argues that these public commitments refute the notion that it will attempt to avail itself of some unilateral, "self-help" action upon issuance of the *USTA II* mandate.

Verizon states that it will provide CLECs with at least 90 days' notice before taking any action pursuant to applicable law and its interconnection agreements. In the meantime, Verizon agrees to continue to provide UNEs as called for under its existing contracts at TELRIC rates. As a result of its commitment, Verizon contends that there is no threatened harm, nor any need for expedited relief as requested by Movants. Verizon also makes arguments similar to those expressed by SBC, claiming that the motion requests relief that is unlawful to the extent it asks the Commission to override the terms of existing interconnection agreements. Verizon argues that to the extent that its contracts give Verizon the right to cease providing UNEs under rules that were struck down by *USTA II*, the Commission cannot lawfully deprive Verizon of those rights by a generic ruling.

Movants seek an order affirming that SBC and Verizon must still provide unbundled network elements under existing rates and terms unless and until contract amendments altering such obligations are approved by the Commission

Responses in Support of the Motion

Parties representing CLEC interests support the motion. The Pure UNE-P Coalition argues that asks that SBC and Verizon are obliged under the

[3] *See* Accessible Letter CLECALL04-095, *SBC Announces UNE-P Rate Stability Through the End of 2004* (June 10, 2004) (Attachment D to SBC's Reply to Motion).

Commission's independent state statutory authority[4] to continue providing UNEs to CLECs, including loops, switching, transport and combinations thereof. In a letter sent on May 25, 2004 to the Commission's Executive Director, Verizon stated that it intends to cease providing the Local Switching UNE to CLECs that order it for use with loops operating at a DS1 or higher capacity. The Coalition claims this action is unilateral and does not adhere to existing ICA obligations.

The Coalition argues that neither party to an ICA may unilaterally change its terms, but must follow those terms as they relate to the modification of the ICA, particularly where one party claims that modification is necessary as a result of a change of law. Since there is a case pending before an Administrative Law Judge to adjudicate Verizon's claim that it need no longer supply the Local Switching UNE for use with high-capacity loops, the Coalition argues that it would be illegal for Verizon to abrogate its ICAs with CLECs by taking the unilateral "self-help" action that it now threatens.

The Coalition argues that, absent Commission action to prohibit it, Verizon will arrogate to itself the authority to change unilaterally the terms of contracts approved by this Commission pursuant to Section 252 of the Telecom Act. The Coalition argues that such an act would be a direct challenge to the authority conferred on this Commission by the Act and that failure to act in the expeditious manner CALTEL requests would be an abdication of the Commission's duties and responsibilities under the Act, and of its statutory mandate to protect the interests of California consumers.

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[4] The Coalition references findings in, *inter alia,* Decision (D.) 99-11-050 and D.01-03-044.

AT&T argues that *USTA II* does not constitute a change of law for purposes of amending existing ICAs, and that there is ample legal authority for requiring the ILECs to continue offering UNEs at TELRIC pricing. Moreover, if there is a change of law, the change of law provisions found in each interconnection agreement apply and these provisions must be followed in order to amend the ICA.

Discussion

Parties responding to the motion all agree that the terms of interconnection agreements must be honored until or unless applicable terms are duly amended through a lawful process. They disagree as to whether the change of law provisions in the various ICAs are triggered by *USTA II* and, if so, whether those provisions either permit or require the ILECs to continue to offer UNE elements at TELRIC prices.

The parties' disagreement thus relates to the terms of individual contracts and applicable renegotiation or dispute resolution processes. The motion does not relate to any single ICA, but rather raises a generic concern about potential behavior of the ILECs in revising the terms of ICAs generally in response to the *USTA II* decision. To the extent that parties disagree over the interpretation and applicability of change of law provisions with respect to amendments to individual ICAs after *USTA II*, the proper forum to resolve such disputes is one where the individual terms of each disputed ICA can be examined, negotiated, and / or adjudicated.

Accordingly, this generic proceeding is not the proper forum for the resolution of those disputes. Because different ICAs have different change of law provisions, the generic ruling sought by movants cannot encompass the case-by-case analysis be required to resolve disputes about the effect of *USTA II* on each

ICA. As AT&T observes, the issue of the ILECs' obligation to continue providing UNEs at TELRIC prices is exactly the sort of question that will have to be negotiated between the parties if and when the ILECs initiate change-of-law discussions. Since, as AT&T concedes, this question is properly treated as an issue for negotiation, the Commission should not prejudge such negotiations by issuing a generic pronouncement as requested by the movants.

In denying the motion, we in no way prejudge the substantive merits of any party's rights or obligations under a specific ICA. To the extent that any CLEC believes that SBC or Verizon is violating its existing obligations under a specific ICA, the appropriate remedy is to invoke the dispute resolution process contained in that ICA. SBC has committed to continue offering UNE elements on existing terms through the end of the year. Verizon has committed to provide CLECs with 90 days' advance notice of any change in UNE offerings or prices. These commitments should provide sufficient lead time for any aggrieved party to avail itself of the appropriate dispute resolution process.

IT IS RULED that:

1. The motion of Competitive Carrier Coalition and the California Association of Competitive Telecommunications Companies is denied.
2. Any party may bring a separate dispute about UNE offerings or pricing to the Commission for resolution in the applicable interconnection agreement.

Dated June 25, 2004, at San Francisco, California.

/s/ THOMAS R. PULSIFER
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion on all parties of record in this proceeding or their attorneys of record. In addition, service was also performed by electronic mail.

Dated June 25, 2004, at San Francisco, California.

/s/ FANNIE SID
Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.